(15)

No. 93-1631

In the Supreme Court of the United States

OCTOBER TERM, 1994

LLOYD BENTSEN, SECRETARY OF THE TREASURY,
Petitioner

v.

COORS BREWING COMPANY, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE UNITED STATES TELEPHONE ASSOCIATION, BELLSOUTH CORPORATION, GTE CORPORATION, NYNEX CORPORATION, ROCHESTER TELEPHONE CORPORATION, SOUTHERN NEW ENGLAND TELEPHONE CORPORATION, SOUTHWESTERN BELL CORPORATION, AND U S WEST, INC., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Amici will address the following questions:

1. Whether, when reviewing a restriction on truthful commercial speech under the First Amendment, a court should defer to legislative findings regarding the necessity for the restriction.

2. Whether a change in circumstances may render unconstitutional a restriction on speech that was valid when enacted.

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INTEREST OF THE AMICI CURIAE

Amici are communications companies in the business of providing telecommunications services and products to the general public, including local telephone service regulated as common carriage under state laws and the federal Communications Act of 1934. *Amici* file this brief to support respondent's contention that the labelling restriction of 27 U.S.C. § 205(e)(2) is inconsistent with the First Amendment.

Amici are now involved in ongoing litigation concerning the constitutionality under the First Amendment of 47 U.S.C. § 533(b), which prohibits telephone companies from providing "video

programming" directly to subscribers within their service areas. Thus far, Section 533(b) has been struck down by two district courts applying "intermediate scrutiny" under the test of *United States* v. *O'Brien*, 391 U.S. 367 (1968). *Chesapeake & Potomac Telephone Co.* v. *United States*, 830 F. Supp. 909 (E.D. Va. 1993), app. pending, Nos. 93-2340, 93-2341 (4th Cir.); *U S West, Inc.* v. *United States*, No. C93-1523R (W.D. Wash. June 15, 1994), app. pending, No. 94-35775 (9th Cir.). Other suits presenting the issue are pending. *Ameritech Corp.* v. *United States*, No. 93-642 (N.D. Ill.); *Ameritech Corp.* v. *United States*, No. 93-CV-74617-CT (E.D. Mich.); *Bellsouth Corp.* v. *United States*, No. CV-93-B-2661-S (N.D. Ala.); *GTE California, Inc.* v. *FCC*, No. 93-70924 (9th Cir.); *NYNEX Corp.* v. *United States*, No. 93-1523 (D. Me); *Pacific Telesis Group* v. *United States*, No. C 93 20915(JW) (N.D. Cal.); *Southern New England Telephone Co.* v. *United States*, No. 3:94CV-80 (D. Conn.); *Southwestern Bell Corp.* v. *United States*, No. 3-94CV0193-D (N.D. Tex.).

Amici therefore have a substantial interest in the proper application of First Amendment intermediate scrutiny, which also will be used to assess the constitutionality of the restriction on commercial speech at issue in this case. And *Amici* believe that the Court, in adjudicating the validity of 27 U.S.C. § 205(e)(2), would be materially aided by an understanding of the ways in which changes in the technological, economic, or regulatory environments may undermine the justifications for restrictions on speech, an issue that *Amici* have addressed in the setting of the video programming ban. *Amici* therefore submit this brief to assist the Court in the resolution of this case.[1]

SUMMARY OF ARGUMENT

1. The Government is incorrect in its assertion that substantial deference is due the purported congressional judgment that the labelling restriction of Section 205(e)(2) is necessary to forestall "strength wars." To the contrary, the Court repeatedly has held that, in assessing the constitutionality of legislation

[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

restricting speech, "[d]eference to a legislative finding cannot limit judicial inquiry." *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 843 (1978). As a consequence, the party seeking to uphold a restriction on commercial speech has the burden of justifying it. That obligation would be rendered nugatory if the courts deferred blindly to the Government's assertions about the effectiveness of or justifications for the restriction.

The Court has made clear that restrictions on commercial speech cannot be justified by speculation or unsupported assumptions. Instead, "a governmental body seeking to sustain a restriction on commercial speech must *demonstrate* that the harms it recites are real and that its restriction will *in fact* alleviate them to a substantial degree" (*Edenfield* v. *Fane*, 113 S. Ct. 1792, 1800 (1993) (emphasis added)); where a federal statute is involved, a reviewing court must assure itself that "Congress has drawn reasonable inferences based on substantial evidence." *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2471 (1994) (plurality opinion). Here, the Government has not carried its burden: the evidence supporting the conclusion that the labelling restriction forestalls "strength wars" is, at best, conclusory and speculative.

2. Moreover, even if it were the case that materials available to Congress would have justified the enactment of the labelling prohibition in 1935, it does not follow that the ban remains enforceable *today* in light of significant changes in the marketplace. This Court has indicated repeatedly that enforcement of a statute, valid when enacted, may become unconstitutional in light of changed circumstances; the constitutionality of a restriction on speech turns on "'whether, *at the time and under the circumstances*, the conditions existed which are essential to validity under the federal Constitution.'" *Landmark Communications*, 435 U.S. at 843-844 (emphasis added) (citation omitted). Application of this principle means that the labelling ban — which, given changes in demand, now serves principally to keep consumers from seeking out *lower*-alcohol beverages — no longer advances a significant government interest (if, that is, it ever did).

This issue may be illuminated by considering how changes in the technological, economic, and regulatory environments have

been held to bear on the constitutionality of the video programming restriction of 47 U.S.C. § 533(b). The provision codifies a regulation that was promulgated in 1970, at a time when cable television was in its infancy and it was thought that cable television operators could not survive in competition with telephone companies. In that setting, the restriction was intended to facilitate competition and diversity in programming. But whatever the force of that justification in 1970, it lacks all validity today, when cable television systems are multi-billion dollar businesses that *themselves* have monopoly status in virtually every community in the Nation. In this new environment, the restriction imposed by Section 533(b) serves only to *restrict* competition. The two courts that have decided the question therefore have held that these changed circumstances render the justification for Section 533(b) constitutionally inadequate. That same principle should be conclusive here as well.

ARGUMENT

In this brief, we address two propositions that underlie the Government's argument: first, that substantial deference is due Congress's purported empirical determination that the labelling restriction of 27 U.S.C. § 205(e)(2) is narrowly tailored to advance the purpose of preventing "strength wars"; and second, that changes in circumstances since the enactment of the FAAA are irrelevant to its constitutionality. We submit that, on both of these points, the Government's position runs counter to the fundamental logic of heightened scrutiny under the First Amendment. Even if the FAAA had been intended by Congress to combat "strength wars" — and respondent demonstrates cogently that it was not — this Court would be obligated to exercise its "independent judgment" on whether the labelling restriction substantially serves that purpose. *Sable Communications of California, Inc.* v. *Federal Communications Commission*, 492 U.S. 115, 129 (1989). This Court's precedents make clear, moreover, that if the justifications for a restriction on speech have been overtaken by events, the restriction no longer may be enforced. And when the Court brings its judgment to bear on the legislative and trial court records here, it should hold the labelling restriction unconstitutional.

A. This Court Should Not Defer to the Purported Congressional Conclusion That the Labelling Restriction is Narrowly Tailored to Advance a Substantial Governmental Interest

1. Perhaps because the evidence supporting the Government's contention that the labelling restriction actually advances a significant objective is so slight, a leitmotif of the Solicitor General's brief is the assertion that this Court must substantially defer to the purported congressional judgment that labelling restrictions will forestall a "strength war." See U.S. Br. 17, 28, 31-32. That might be so if the constitutionality of the labeling restriction were assessed under the lowest level of rationality review where the "legislative choice * * * may be based on rational speculation unsupported by evidence or empirical data." *FCC* v. *Beach Communications*, 113 S. Ct. 2096, 2102 (1993). But the Government's invocation of deference entirely fails to recognize that the First Amendment standard applicable here

> is far different, of course, from the "rational basis" test used for Fourteenth Amendment equal protection analysis. * * * There it suffices if the law could be thought to further a legitimate governmental goal, without reference to whether it does so at inordinate cost. Here we require the government goal to be substantial, and the cost be carefully calculated. Moreover, since the State bears the burdens of justifying its restrictions, * * * it must affirmatively establish the substantial fit we require.

Board of Trustees v. *Fox*, 492 U.S. 466, 480 (1989).

As a consequence, where heightened scrutiny of government action is applied — in particular, in cases involving restrictions on speech — the Court consistently has held that "[d]eference to a legislative finding cannot limit judicial inquiry." *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 843 (1978). "'[A legislative determination] does not preclude inquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution.'" *Id.* at 843-844, quoting *Whitney* v. *California*, 274 U.S. 357, 378-379 (1927) (Brandeis, J., concurring) (bracketed material added by the Court). In this inquiry, the Court must bring

its "independent judgment" to bear. *Sable Communications*, 492 U.S. at 129. See *Whitney*, 274 U.S. at 374 (Brandeis, J., concurring).

The Court's approach has been compelled by the constitutional imperative standing behind the First Amendment.[2] A restriction of the sort challenged here "threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard. * * * [T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield* v. *Fane*, 113 S. Ct. 1792, 1798 (1993). See *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-764 (1976). By the same token, content-neutral restrictions on noncommercial speech, which are subject to a searching "intermediate scrutiny" similar to that used to assess regulations of commercial expression (see *Turner Broadcasting System, Inc.* v. *Federal Communications Commission*, 114 S. Ct. 2445, 2469 (1994)),[3] "'can significantly impair the ability of individuals to communicate their views to others'" and thus impair the "'unfettered interchange of ideas.'" *City of Ladue* v. *Gilleo*, 114 S. Ct. 2038, 2045 n.13 (1994), quoting Stone,

[2] Heightened "intermediate" scrutiny also is applied in other circumstances — for example, in the review of classifications discriminating on the basis of gender. And it is hardly likely that the Court would defer to the legislative judgment in such cases, which tend to involve "increasingly outdated misconceptions concerning the role of women in the home." *Craig* v. *Boren*, 429 U.S. 190, 198-199 (1976). This, in turn, militates against excessive deference to legislative judgments in the First Amendment context; it hardly makes sense for courts to defer to different degrees when applying the same sort of intermediate scrutiny in different settings.

[3] The Court has indicated that the tests are "very similar." *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. 2696, 2705 (1993). See *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 537 n.16 (1987). Precedents involving content-neutral restrictions on speech, or on expressive conduct (see *United States* v. *O'Brien*, 391 U.S. 367 (1968)), therefore have application here.

Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46, 57-58 (1987) (citation omitted).

The importance of these considerations has led the Court to hold consistently that "the party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983). See, *e.g.*, *Ibanez* v. *Florida Dept. of Business and Professional Regulation*, 114 S. Ct. 2084, 2088 n.7 (1994); *Edenfield*, 113 S. Ct. at 1800; *City of Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 (1993); *Fox*, 492 U.S. at 480. Yet that obligation would be rendered nugatory if the courts deferred blindly to the government's assertions about the effectiveness of or justifications for the regulation. Thus

> A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether * * * the legislation is consonant with the Constitution. Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.

Landmark Communications, 435 U.S. at 844. And in the specific context of commercial speech, the Court has warned that without the requirement that the government affirmatively establish the justification for a challenged restriction, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Edenfield*, 113 S. Ct. at 1800. See *Ibanez*, 114 S. Ct. at 2092.

2. The Court has had occasion to address in some detail the nature of the government's burden in establishing the constitutionality of a restriction on speech, and the limited role that deference to legislative judgments plays in satisfying that burden. "The state's burden is not slight; the 'free flow of commercial information is valuable enough to justify imposing on would-be regulators the cost of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Ibanez*, 114 S. Ct. at 2089, quoting *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985). This "burden is

not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must *demonstrate* that the harms it recites are real and that its restriction will *in fact* alleviate them to a substantial degree." *Edenfield*, 113 S. Ct. at 1800 (emphasis added). See *Ibanez*, 114 S. Ct. 2089.

The sort of deference postulated by the Government — in which the legislature states its concern and announces its goals, and the court declines to look behind those pronouncements — cannot be squared with these principles. As Justice Brandeis rather pungently put it, "[f]ear of serious injury cannot justify suppression of free speech and assembly. Men feared witches and burnt women." *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring). Thus, "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'" *Turner Broadcasting*, 114 S. Ct. at 2470 (plurality opinion) (citation omitted).

This means that it is "incumbent upon" a court "to go behind the legislative determination and examine for itself" the factual assumptions upon which the restriction is based. *Landmark Communications*, 435 U.S. at 844. In conducting this inquiry, of course, courts should not wholly disregard legislative judgments, particularly those that are predictive or discretionary in nature.[4] But this does not mean that such judgments

> are insulated from judicial review altogether. On the contrary, we have stressed in our First Amendment cases that deference to legislative findings does not "foreclose an independent judgment on the facts bearing on an issue of constitutional law." * * * This obligation to exercise

[4] It may be that greater deference is due the legislative judgment on whether the particular problem addressed by the restriction on speech implicates a substantial state interest; that determination necessarily involves value judgments, the validity of which may not be susceptible to mathematical verification. But the determinations whether the restriction substantially advances the state's goal and is overbroad involve factual issues that courts plainly are competent to address.

> independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence *de novo*, or to replace Congress's factual predictions with ours. Rather, *it is to assure that, in formulating judgments, Congress has drawn reasonable inferences based on substantial evidence*.

Turner Broadcasting, 114 S. Ct. at 2471 (plurality opinion) (emphasis added) (citation omitted).

There are several considerations that have guided the Court's inquiry in this regard. *First*, the inferences drawn by the government are insufficient to support a restriction on commercial speech if they are "speculative" or involve "conditional or remote eventualities." *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557, 569 (1980). *Second*, it is not enough that the assumptions underlying the regulation are "plausible" (*Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 96 n.10 (1977)); they must have a demonstrable basis in reality. And *third*, the "Court 'may not simply assume that the [restriction] will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity.'" *Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986), quoting *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 803 n.2 (1984). Instead, the Court will look not only to the legislative record, but also to evidence presented at trial relating to the actual and anticipated operation of the restriction. See *Preferred Communications*, 476 U.S. at 494-495.[5]

3. The Court's application of these principles in its recent decisions provides considerable guidance on the application of intermediate First Amendment scrutiny here. Thus in *Edenfield*, the Court invalidated Florida's ban on in-person solicitation of business by certified public accountants. The Court recognized that the interests asserted by the state were substantial. See 113 S. Ct. at 1799-1800. But the Court was entirely unwilling to defer to the

[5] See, *e.g.*, *Ibanez*, 114 S. Ct. at 2090 & n.10; *Edenfield*, 113 S. Ct. at 1801-1803; *Sable Communications*, 492 U.S. at 128; *Linmark*, 431 U.S. at 95-96 & n.10.

state's conclusory assertions about the necessity for and the effectiveness of its regulation. Instead, the Court conducted a searching examination of the record materials bearing on the effect of the challenged ban on speech.

This independent examination of evidence led the Court to find the restriction unconstitutional because the state

> has not demonstrated that * * * the ban on CPA solicitation advances its asserted interests in any direct and material way. It presents no studies [establishing the dangers purportedly addressed by the regulation]. The record does not disclose any anecdotal evidence, either for Florida or for other states, that validates the [state's] supposition. This is so even though 21 States place no specific restrictions of any kind on solicitation by CPAs.

113 S. Ct at 1800. The Court added that affidavit evidence submitted by the State was insufficient to support the restriction because it "contains nothing more than a series of conclusory statements that add little if anything to the [state's] original statement of its justification." *Id.* at 1801.

By the same token, the Court refused to defer to the state's judgment simply because the restriction on speech was a prophylactic rule that was premised on predictive judgments. That consideration, the Court explained, "in no way relieves the State of the obligation to demonstrate that it is regulating speech in order to address what is *in fact* a serious problem and that the preventative measure it proposes will contribute in a material way to solving that problem." 113 S. Ct. at 1803 (emphasis added). Under any other rule, the Court continued,

> the protection afforded commercial speech would be reduced almost to nothing; comprehensive bans on certain categories of commercial speech would be permitted as a matter of course. * * * It would also be inconsistent with this Court's general approach to the use of preventative rules in the First Amendment context. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the

> touchstone in an area so closely touching our most precious freedoms."

Id. at 1803-1804, quoting *NAACP* v. *Button*, 371 U.S. 415, 438 (1963).

The Court took an identical approach last Term in *Ibanez*, where it invalidated another Florida restriction on certain advertising by certified public accountants. The Court declined to defer to the "State's 'unsupported assertions,'" explaining that "'broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force.'" 114 S. Ct. at 2089, quoting *Zauderer*, 471 U.S. at 648-649. After concluding that the record materials did not support the state's assertions (see *id.* at 2090 n.10), the Court accordingly held that in the "'absence of evidence,'" the state's "'concern about the possibility of [harm] in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment.'" *Id.* at 2090, quoting *Peel* v. *Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91, 106, 110 (1990).

Most recently, in *Turner Broadcasting*, the Court was unwilling to defer blindly even to the most elaborate and detailed congressional findings. The case involved a challenge to the so-called "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992. The statute was enacted after three years of hearings (see 114 S. Ct. at 2454) and contained "unusually detailed statutory findings" about the purported necessity for the challenged restrictions. *Id.* at 2461. But seven Members of the Court nevertheless found the congressional findings insufficient to support the Act's restrictions on speech upon application of the intermediate scrutiny mandated by *O'Brien*.

Four Justices in the plurality found that "[o]n the state of the record developed thus far, and in the absence of findings of fact from the District Court, we are unable to conclude that the Government has satisfied" its burden of showing either that a genuine problem existed or that the must-carry provisions would not burden more speech than necessary. 114 S. Ct. at 2470. In particular, the Court noted that the Government relied on a study conducted by the Federal Communications Commission that had been considered by Congress. But the plurality itself reviewed the

study and found it insufficiently probative (see *id.* at 2471), explaining that "[w]ithout a more substantial elaboration in the District Court of the predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence * * * we cannot determine whether the threat to broadcast television is real enough to overcome the challenge to the provisions * * * ." *Id.* at 2472.

Similarly, the plurality noted that "[a]lso lacking are any findings concerning the actual effects of must-carry on the speech of cable operators and cable programmers," explaining that "[t]he answers to these and perhaps other questions are critical to the narrow tailoring step of the *O'Brien* analysis." *Ibid.* And "[f]inally, the record fails to provide any judicial findings concerning the availability and efficacy of 'constitutionally acceptable less effective means' of achieving the Government's asserted interests." *Ibid*, quoting *Sable Communications*, 492 U.S. at 129. The plurality therefore concluded that a remand was necessary "to permit the parties to develop a more thorough factual record." *Ibid.* At the same time, three dissenting Justices would have held the restriction on speech unconstitutional under the *O'Brien* test even without a remand because, notwithstanding the congressional findings, the must-carry provisions "restrict too much speech." *Id.* at 2479 (O'Connor, J., joined by Scalia and Ginsburg, JJ., concurring in part and dissenting in part).

The Court consistently has applied a similar approach to invalidate restrictions on speech that do "not sufficiently serve those public interests that are urged as its justification." *United States* v. *Grace*, 461 U.S. 171, 181 (1983). And needless to say, the Court has been no less willing to do so when the legislative judgments concerned have been made by Congress. See, *e.g.*, *Sable*, 492 U.S. at 128; *FCC* v. *League of Women Voters*, 468 U.S. 364, 388-399 (1984); *Bolger*, 463 U.S. at 73; *Grace*, 461 U.S. at 181-182.

4. Viewed in the light of these decisions, the Government plainly has made an insufficient showing in this case that "Congress has drawn reasonable inferences based on substantial evidence." *Turner*, 114 S. Ct. at 2471 (plurality opinion). In contending that the labelling restriction substantially advances the asserted interest of forestalling "strength wars," the Government places great

reliance on what it characterizes as the "historical evidence" before Congress when it enacted the FAAA in 1935. U.S. Br. 28-29. But on examination, the Government's own description shows that the "evidence" is not probative at all. The concern that labels in 1935 were *deceptive* (see U.S. Br. 8) simply does not address the point whether an accurate recitation of alcohol content would prompt "strength wars." And the few statements that were made around the time of the enactment of the FAAA regarding strength wars were no more than isolated, vague, and conclusory expressions of opinion. See *ibid.* Such statements, which provide "only the most limited and incremental support" for the Government's assertion (*Bolger*, 463 U.S. at 73), plainly are inadequate to justify suppression of truthful commercial speech. See, *e.g.*, *Ibanez*, 114 S. Ct. at 2090.

The other evidence marshalled by the Government is similarly speculative. The Government asserts, for example, that the labelling ban is justified because "[t]his Court has recognized as a matter of common sense that a restriction on the advertising of a product decreases demand for the product." Br. 27. But while common sense may support the conclusion that demand will fall if advertising *designed to promote* consumption is prohibited, it hardly follows that prohibiting the simple recitation of alcohol content on a label will reduce demand for high-alcohol products; as Coors explains in its brief, it is at least as likely that such labelling will facilitate demand for *lower* alcohol products. And even if the Government's contrary hypothesis is "plausible," that is not enough to justify a ban on speech. *Linmark*, 431 U.S. at 96 n.10.

The Government's contention that a narrower restriction could not have served the asserted interests because "Congress could reasonably have believed that a labeling restriction applicable to all types of malt beverages would be more effective than one applicable only to malt liquor" (Br. 35), meanwhile, is patently insufficient. It is premised on *no* evidence at all (see *id.* at 35-36) and presents "no evidence of *how* effective or ineffective" alternative means of achieving the congressional purpose would be. *Sable*, 492 U.S. at 129 (emphasis in original). In all, this Court has "never sustained restrictions on constitutionally protected speech on a record so bare" (*Ibanez*, 114 S. Ct. at 2091), and it should not do so now.

B. Changed Circumstances Render Enforcement of the Labelling Restriction Unconstitutional

1. The Government's submission is flawed for an additional reason as well. Even if it were the case that the materials before Congress justified the enactment of the labelling prohibition in *1935*, it does not follow that the ban remains enforceable *today* in light of significantly changed circumstances in the marketplace. The Government entirely fails to come to grips with this point.

As a matter of principle, there can be no doubt that enforcement of a statute, constitutional when enacted, may become unconstitutional in light of changed circumstances. To take an obvious example, it may be that a proscription on publishing the departure dates of troop ships is enforceable during time of war. See *Near* v. *Minnesota*, 283 U.S. 697, 716 (1931). But we doubt that even the Government would contend that such a ban may be enforced once the war is over. The reason is plain. The constitutionality of a restriction on speech turns on "'whether, *at the time and under the circumstances*, the conditions existed which are essential to validity under the federal Constitution.'" *Landmark Communications*, 435 U.S. at 843, 844, quoting *Whitney*, 274 U.S. at 378-379 (Brandeis, J., concurring) (emphasis added). And "a 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.'" *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 36 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

Not surprisingly, then, it has long been settled that "[a] statute valid when enacted may become invalid by a change in the conditions to which it is applied." *Nashville, Chattanooga & St. Louis Ry.* v. *Walters*, 294 U.S. 405, 415 (1935). In *Nashville, Chattanooga*, for example, Justice Brandeis, writing for the Court, explained that the state court

> held that the statute [requiring railroads to pay one-half the cost of providing for grade separation to eliminate a grade crossing] was, upon its face, constitutional; that when it was passed the State had, in the exercise of its police power, authority to impose upon railroads [such costs]; and that the Court could not * * * consider "whether the provisions of the act in question have been

> rendered burdensome or unreasonable by changed economic and transportation conditions" * * * . *A rule to the contrary is settled by the decisions of this Court.*

Id. at 414-415 (emphasis added). The Court explained that such a development requiring reconsideration of the statute's validity might have been worked by "the revolutionary changes incident to transportation wrought in recent years" (*id.* at 416) and remanded for factual development on the point. See *id.* at 428-434. See *Abie State Bank* v. *Bryan*, 282 U.S. 765, 772 (1931) (Hughes, C.J.) ("a police regulation, although valid when made, may become, by reason of later events, arbitrary and confiscatory in operation"). Needless to say, it remains the case today that "when we deal with the First Amendment, when the reason for a restriction disappears, the restriction should as well." *Burson* v. *Freeman*, 112 S. Ct. 1846, 1864 (1992) (Stevens, J., dissenting). See also *Tennessee* v. *Garner*, 471 U.S. 1, 13 (1985) (application of common law rule rendered unconstitutional by, in part, "sweeping change in the legal and technological context").

That principle has clear application here. In light of the profound "changes in the malt beverage industry and market since 1935" (Pet. App. 6a), which now finds the "vast majority" of consumers seeking lower alcohol beverages (*id.* at 8a), Congress's concern about strength wars in 1935 no longer provides an adequate justification for the labelling restriction (if it ever did). The Government's only response to this point is its assertion that "[t]he validity of an Act of Congress should not depend upon such cyclical shifts in consumption patterns" because "[e]ven if we assume that the majority preference has changed since [1935], it can change again in the future." Br. 29 (footnote omitted). But a restriction on speech, unjustified under present conditions, cannot be upheld on the entirely speculative ground that it may *become* justified at some unspecified date in the future. To return to our initial example, we doubt that even the Government would seriously contend that a ban on publishing the departure dates of

troop ships in peacetime may be supported on the ground that the country may be at war again some day in the future.[6]

2. In considering the Government's cavalier dismissal of "changes in consumer patterns," it might be useful for the Court to have before it other examples of how developments in the technological, economic, and regulatory environment may affect the assessment of a statute's constitutionality under the First Amendment. In this regard, we urge the Court to bear in mind ongoing litigation in which *amici* are now involved concerning the constitutionality of 47 U.S.C. § 533(b), a part of the Cable Act of 1984. See page 2, *supra*.

Section 533(b) prohibits telephone companies and their affiliates from providing "video programming" directly to subscribers within their service areas. The provision is derived from an FCC regulation promulgated in 1970 that barred telephone companies from providing cable television service in their telephone service areas.[7] At the time, cable television (then called "community antenna television" or "CATV") was primarily a means of improving television reception in areas, mostly rural, where over-the-air broadcast reception was poor. See *Turner Broadcasting*, 114 S. Ct. at 2451; National Telecommunications

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[6] In arguing that changed circumstances should be disregarded, the Government cites *Bolger* and *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978), for the proposition that "insufficiency of [the] original motivation for [a] restriction on commercial speech does not invalidate [the] restriction if it continues to advance other legitimate purposes." U.S. Br. 29. But that principle hardly serves to validate a restriction that *no longer* serves *any* valid purpose. Here, in any event, the only purpose that the Government asserts as a justification for the labelling restriction is that of preventing "strength wars," which *is* (at least in the Government's view) the original purpose of the legislation.

[7] *Applications of Telephone Common Carriers for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems (Final Report and Order)* ("*1970 Order*"), 21 F.C.C.2d 307 (1970), recons. in part, 22 F.C.C.2d 91970), aff'd sub nom. *General Telephone Co.* v. *United States*, 449 F.2d 846 (5th Cir. 1971)

and Information Administration, *NTIA Telecom 2000*, at 543 (Oct. 1988). It was thought that the restriction would foster competition by enabling cable operators to obtain a secure foothold in the marketplace. *In re Telephone Company-Cable Television Cross-Ownership Rules (Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking)* ("*Video Dialtone Order*"), 7 FCC Rcd 5781, 5848 (1992); *NTIA Telecom 2000*, at 542.

When it enacted Section 533(b) in 1984, Congress appeared to believe that the provision simply codified the FCC's regulation. H.R. Rep. No. 934, 98th Cong., 2d Sess. 56 (1984).[8] Congress's precise goals in doing so are unclear. "Legislative materials relating to § 533(b) are sparse. No legislative findings of fact accompanied the provision." *Chesapeake and Potomac Telephone Co.* v. *United States*, 830 F. Supp. 909, 913 (E.D. Va. 1993) ("*C & P*"), app. pending, No. 93-2340 (4th Cir.).

However much sense this restriction made in 1970 (or in 1984) as a means of protecting a fledgling industry, developments on a number of fronts in the intervening years mean that Section 533(b) no longer serves (if it ever did) to advance a significant government interest. *First*, economic conditions in the cable television industry have undergone a 180 degree change. While cable served only approximately 9% of all homes in 1970, it is now a multi-billion dollar -- and in virtually all communities a monopoly -- industry. See *C & P*, 830 F. Supp. at 915. *Second*, radical technological changes have taken place since 1970; it is now possible for telephone companies to provide video programming over the basic telephone network. And *third*, the Federal Pole Attachment Act of 1978, 47 U.S.C. § 224, substantially eliminated concerns that telephone companies might discriminate against independent cable operators in granting access to telephone poles for the attachment of cables.

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[8] In fact, the statute made a significant (though unexplained) change: while the FCC had barred telephone companies from providing "CATV service," the congressional prohibition applies to "video programming."

Given these developments, each of the federal agencies responsible for telecommunications policy has concluded that the video programming ban reduces competition and diversity. Cf. *League of Women Voters*, 468 U.S. at 376-377 n.11 (noting that Court might be willing to revisit rules governing regulation of broadcast television upon "some signal from Congress or the FCC that technological developments have advanced"). In 1992, the FCC, after compiling a full administrative record over a five-year period, formally recommended that Congress repeal Section 533(b) to advance competition and increase the services available to the public. See *Video Dialtone Order*, 7 FCC Rcd at 5847-5851. The Department of Justice (outside the context of litigation over the constitutionality of Section 533(b)) also has concluded that telephone company "provision of video programming will have procompetitive benefits." Reply Comments of the U.S. Dept. of Justice, *Telephone Company-Cable Television Cross-Ownership Rules*, CC Dkt 87-266 at 44-46 (Mar. 13, 1992). And the National Telecommunications and Information Administration of the Department of Commerce likewise has concluded that removing Section 533(b) would "expand[] competition in the provision of video programming" and that potential dangers "are either overstated or can be effectively ameliorated by adapting existing regulatory safeguards." NTIA, *Telecommunications in the Age of Information* 235 (1991).

In light of these dramatic changes, a number of telephone companies, including several of *amici*, have challenged Section 533(b) on First Amendment grounds. And the two courts that have thus far decided the issue have applied intermediate scrutiny and held the statute unconstitutional. *Chesapeake and Potomac Telephone Co.* v. *United States*, *supra*; *U S West, Inc.* v. *United States*, *supra*.

The Section 533(b) litigation holds valuable lessons for this case. The legislative, regulatory, and trial records in the Section 533(b) litigation make clear beyond peradventure that factual developments may leave restrictions on speech without any meaningful support. And when assessing the Government's dismissive comments in this case about the significance of "cyclical shifts in consumption patterns," the Court should remain sensitive to the fact that changed circumstances bearing on the

constitutionality of other legislation may be irrevocable and profound. We submit that here as well, the Government has failed to demonstrate any continuing justification for the labelling restriction in light of the changes in market conditions identified by respondent and the courts below. The Court therefore should hold that restriction unconstitutional.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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